gas from TXU Retail on the spot-market, rather than under the Master Agreement, to meet the needs of its cost-plus contract customers. To do so, rather than negotiating a confirmation as required by the Master Agreement, MME telephoned TXU Retail and orally placed a market order for gas. TXU Retail, which like MME, was a natural gas retailer without its own gas supply, would, in turn, buy the gas from its wholesale-trading affiliate at the spot-market price, which was based on one of two industry-accepted market indices: *Gas Daily*'s index, which is used for daily transactions, and *Inside FERC*'s index, which is used for monthly transactions. The market price charged to TXU Retail by its wholesale-trading affiliate was known as the "internal transfer price," and was passed on to MME.

During the approximately two-year period in which MME purchased spot-market gas, TXU Retail's monthly invoices contained separate entries for gas purchased pursuant to confirmations under the Master Agreement (Confirmed Transactions) and on the spot-market. The invoices specifically identified spot-market purchases with the notation "spot-market," which was followed by the volume delivered and its price. The spot-market purchase price always differed from the Confirmed Transactions' price. In fact, before paying an invoice, MME compared its spot-market price to *Gas Daily*'s index for the relevant period to confirm that it had been charged the market price.

During the winter of 2000-2001, natural gas prices skyrocketed as a result of unusually cold weather, increasing from about $4 per MMBtu to more than $23 per MMBtu. Apparently unable to pass through the high prices to certain of its cost-plus customers, MME claimed for the first time that the spot-market gas price was governed by the Master

Agreement's pricing provisions and demanded, pursuant to the agreement, that TXU Retail provide it with cost information about the spot-market gas sold to MME during the Disputed Period. In addition, MME, which already was greatly in arrears on its payments to TXU Retail for other gas deliveries,[4] refused to pay for the spot-market gas deliveries during that period.

B. The arbitration proce ding.

Unhappy with the cost information provided by TXU Retail, MME, on October 11, 2001, sent TXU Retail a cryptic notice stating that MME "hereby gives notice pursuant to Article 14 of its Master Agreement with TXU of commencement of arbitration of the disputes between MME and TXU which are subject to that provision. . . ."[5] A few months later, MME made a "Demand for Arbitration." The demand described the parties' dispute as follows: "MME bought natural gas from TXU. . . . [The] Contract calls for the price to be based on TXU's cost. Claimant believes TXU charged substantially more than called for under contract. TXU refuses to provide cost information. . . ." As relief, the demand sought "information regarding TXU's cost. Based on one month's cost data . . . , the claim will be in excess of $2,000,000. . . ."

---

4. Shortly before this dispute arose, MME was more than $18 million in arrears on its payments to TXU Retail for its natural gas purchases.

5. Under the Master Agreement either party could submit "any disagreement, difference, or dispute among the Parties arising under this Agreement" to arbitration in accordance with "the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association." Pet.'s App. at 43a.

As required by the Master Agreement, a three-member arbitration panel (the Panel), consisting of an arbitrator appointed by MME, an arbitrator appointed by TXU Retail, and a neutral arbitrator, who had the sole authority to "hear and decide all matters relating to the dispute," was empaneled by the American Arbitration Association. Pet.'s App. at 42a. Unfortunately, the parties failed to create a single, comprehensive document that set forth the precise issues the Panel was to decide. Rather, on April 26, 2002, MME, at the request of the neutral arbitrator, filed its "Statement of Claims." Paragraph 4.1 of the statement alleged the following contract breaches: (1) breach of Section 7.4 of the Master Agreement because TXU Retail failed to allow MME to inspect its records; (2) breach of Section 7.2 of the Master Agreement because TXU Retail improperly exercised MME's letter of credit;[6] and (3) TXU Retail's "violat[ion] of the [Master] Agreement by supplying gas to MME for spot purchases made between November 2000 and February 2001 and subsequently overcharging MME for said purchases." Notwithstanding this last claim, the statement's "prayer for relief" oddly did not seek damages for the alleged overcharges. Instead, it asked the Panel to order TXU Retail to: (1) "produce its books and records to MME . . . ;" (2) return all amounts drawn under the letter of credit . . . until such time that TXU can prove all amounts allegedly due and owing;" (3) declare "that the [Master] Agreement does not allow TXU [Retail] to obtain gas from its affiliate corporation, mark up the wholesale cost of the gas as if it was purchased from a non-affiliated third party, and claim

6. As pointed out above, MME refused to pay for its spot-market gas purchases during the Disputed Period. In addition, as it also owed TXU Retail millions more for gas purchases under Confirmed Transactions, TXU Retail exercised a $10 million letter of credit provided by MME to secure its payment for its natural gas purchases.

this is the proper cost of gas to MME under the Agreement;"[7] and (4) award MME its costs and attorneys' fees.

TXU Retail's response to MME's "Statement of Claims," among other things, denied that the Master Agreement covered MME's spot-market gas purchases. Relying on Section 2-208 of the Uniform Commercial Code, the response maintained that the parties' two-year course of performance relating to such purchases "establishes a separate and distinct contract regarding the price for spot gas, or, in the alternative, provides additional contract terms regarding the price of spot gas[,]" and that, pursuant to the course of performance, spot gas was priced at market. In addition, TXU Retail counterclaimed against MME for breach of the Master Agreement because MME failed to pay TXU Retail: (1) a portion of its gross profit on the resale of the gas it purchased under the Master Agreement, as required by the agreement; and (2) for "liquidated forward positions and other amounts owed."

After more than a year of discovery, a three-day arbitration hearing was held in September 2002. In anticipation of the hearing, both parties filed pre-arbitration briefs. MME's brief greatly modified its claims and theories. Despite the failure of its "Statement of Claims" to request damages for alleged spot-market gas overcharges during the Disputed Period, MME, in its brief, requested more than $7 million in such damages. Moreover, MME's brief asserted an entirely new theory regarding why it had been overcharged for some spot-market gas. Unlike its arbitration demand and its "Statement of Claims," which alleged that MME was to be charged TXU Retail's wholesale-trading affiliate's actual

7. Although virtually unintelligible, this refers to TXU Retail's internal transfer price.

gas cost for spot-market gas (as allegedly required by the Master Agreement's pricing provisions), MME's brief for the first time claimed that the Confirmed Transactions were "full requirements contracts" that required TXU Retail to sell MME not only the gas volumes specified in the confirmations, but also any additional spot-market gas used by the customers, at the confirmation's fixed price. Thus, MME bifurcated its overcharge claim, alleging that it was to be charged two different prices for spot-market gas: the Confirmed Transactions' price for spot-market gas delivered to MME's Confirmed Transactions customers and the Master Agreement's price, which it contended was TXU Retail's wholesale-trading affiliate's cost, for spot-market gas delivered to its other customers.[8]

TXU Retail's Pre-Arbitration Brief, consistent with its response to MME's "Statement of Claims," reiterated its position that the parties' course of performance either modified the Master Agreement or resulted in a separate course-of-performance contract pursuant to which spot-market gas purchases were priced at market. Also, believing that MME was challenging the reasonableness of its internal transfer price during the Disputed Period, the brief clearly stated that TXU Retail would adduce testimony during the hearing establishing that the internal transfer price was reasonable because it was "well within the market price ranges published in both *Inside FERC* and *Gas Daily*."

Immediately before the arbitration hearing began, the parties advised the Panel that MME had agreed to pay TXU Retail about $2 million in settlement of TXU Retail's

8. MME's Pre-Arbitration Brief also recognized, and attempted to refute, TXU Retail's position that the spot-market gas price was the market price pursuant to the parties' course of performance.

counterclaims. The parties also advised the Panel that they had agreed that there was to be one final arbitration award in the case, incorporating both the Panel's decision regarding MME's claims and the settlement of TXU's counterclaims.

During the hearing, *both* parties adduced evidence about the proper spot-market gas price during the Disputed Period, with TXU Retail presenting expert testimony, without objection from MME, establishing that its internal transfer price during the Disputed Period was reasonable because it was within the range of the relevant gas-market price indices. Also, during the hearing, MME once again significantly modified its claims. Among other things, it contended for the *first* time that it was damaged because TXU Retail's spot-market gas charges during the Disputed Period exceeded the market price, thereby preventing MME from passing the full cost through to certain customers under their cost-plus contracts (MME's Pass-Through Claim or the Pass-Through Claim). As a result of this new claim, the Panel, at the arbitration hearing's conclusion, held the record open so MME could present additional evidence to support it.

In addition, after the hearing's conclusion, the neutral arbitrator wrote the parties a letter (the Neutral Arbitrator's Post-Hearing Letter) squarely placing them on notice that the Panel would decide the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period. In this regard, the letter asked the parties to provide information to the Panel so it could determine if TXU Retail's spot-market gas charges during the Disputed Period reflected the market price.

MME did *not* complain to the neutral arbitrator that a determination of the reasonableness of TXU Retail's spot-

market gas charges during the Disputed Period was outside the scope of the parties' submissions or that the information sought by his letter was irrelevant for that reason. Instead, MME, as well as TXU Retail, supplemented the arbitration record about MME's Pass-Through Claim and provided the information requested by the Neutral Arbitrator's Post-Hearing Letter. In addition, they filed post-hearing briefs.

Needless to say, MME's brief argued that the Master Agreement or the Confirmed Transactions set the spot-market gas price and increased MME's damages from the alleged overcharges to more than $7.4 million. TXU Retail's brief reiterated its course-of-performance argument and further argued that the spot-market gas price was the market price, that its internal transfer price during the Disputed Period was reasonable because it was in the range of the relevant gas-market price indices during that period, and that MME's alleged inability to pass through the spot-market gas price to certain of its cost-plus contract customers during the Disputed Period was not the result of TXU Retail's alleged overcharges. Even though TXU Retail's post-hearing brief

> made it crystal clear that TXU [Retail] believed that the [Panel was] empowered to address the reasonableness of TXU [Retail's] spot-market prices during the Disputed Period, MME chose not to send a letter or seek leave to file a reply challenging TXU [Retail's] submission of an issue that MME had (supposedly) not agreed to arbitrate.

Pet.'s App. at 18a.

The Arbitration Award was issued on March 3, 2003. Pet.'s App. at 30a-38a. Even MME's appointed arbitrator flatly rejected MME's claim that the Master Agreement and/or the Confirmed Transactions set the spot-market gas price. Instead, the Panel unanimously found that a separate course-of-performance contract set the price at market and that TXU Retail's internal transfer price during the Disputed Period was fair and reasonable because it was within the range of the relevant gas-market price indices during that period. *Id.* at 33a-36a. Accordingly, the Panel ordered MME to pay TXU Retail "the amount of $1,830,866.19"[9] and "one-third of its attorneys' fees . . . and . . . costs excluding the fees of its appointed arbitrator." *Id.* at 36a. The Panel finally ordered TXU Retail to submit "affidavits" to the neutral arbitrator establishing its attorneys' fees and costs and allowed MME to "challenge the reasonableness of any charge." *Id.* at 37a.

Even though MME (supposedly) believed that the attorneys' fees award was a direct result of the Panel's improper determination of the reasonableness of TXU Retail's spot-market gas prices during the Disputed Period, MME failed either to send a letter to the Panel objecting to the award on that basis or to file a motion for its reconsideration on that basis. Instead, in responding to TXU Retail's attorneys' fees' affidavits, MME only argued that TXU Retail was not entitled to recover its attorneys' fees because TXU Retail's own actions – its failure to provide MME with information about the cost of the spot-market gas sold to MME during the Disputed Period – necessitated the arbitration. *Id.* at 39a-40a. The Panel rejected MME's

9. This amount included an offset to the settlement amount of about $174,000 because of accounting errors and other matters raised by the Panel in its audit of TXU Retail's charges for spot-market gas during the Disputed Period. Pet. App. at 35a-36a.

argument and awarded TXU Retail about $126,000 in attorneys' fees and costs in its "Final Order." *Id.*[10]

C. This lawsuit.

Needless to say the arbitration was a disaster for MME – not only did the Panel reject its claim that it was overcharged for spot-market gas during the Disputed Period, but it also ordered MME to pay TXU Retail about $2 million for its Master Agreement breaches and to reimburse TXU Retail for its arbitration expenses. Unwilling to accept this result, MME fired the attorneys who represented it in the arbitration and hired new ones to commence this action in an attempt to relitigate the issue of whether it had been overcharged for its spot-market gas purchases during the Disputed Period. Accordingly, its pleadings in the District Court sought: (1) to vacate the arbitration award to the extent that it found that TXU Retail's spot-market gas charges were reasonable during the Disputed Period and awarded TXU Retail attorneys' fees; and (2) damages from TXU Retail for the alleged overcharges.

Both parties moved for summary judgment. The District Court granted MME's motion, holding that the Panel exceeded its authority by: (1) determining the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period because the only issue in the arbitration was whether the Master Agreement set the spot-market gas price; and (2) awarding TXU Retail attorneys' fees because the award necessarily was based on the Panel's inappropriate decision that TXU Retail's spot-market gas charges during the Disputed Period were reasonable.

---

10. The "Final Order" erroneously refers to TXU Energy Trading Co. instead of TXU Retail.

TXU Retail (and the other Respondents) appealed to the Third Circuit. With respect to the district court's ruling regarding the Panel's determination of the reasonableness of its spot-market gas charges during the Disputed Period, TXU Retail, after pointing out that the parties, during the arbitration, had failed to set forth the precise issues the Panel was to decide in a single, comprehensive document or otherwise, framed the issue in terms of whether the parties submitted the spot-market gas charges' reasonableness to the Panel for determination. Citing the Third Circuit's decision in *Matteson v. Ryder Sys., Inc.*, 99 F.3d 108, 113 (3d Cir. 1996), TXU Retail argued that the Panel's interpretation of the scope of the submitted issues was entitled to the same far-reaching respect and deference accorded to its findings of fact and interpretations of the law, and concluded that MME and TXU Retail's arbitration pleadings, briefs, and conduct provided a reasonable, if not conclusive, basis for the Panel to conclude that it was empowered to decide the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period.

With respect to the attorneys' fees award, TXU Retail argued that the District Court improperly vacated the award because it ignored the Panel's finding that TXU Retail was the "non-defaulting Party" under the Master Agreement's attorneys' fees provision, not because it determined that TXU Retail's spot-market gas charges during the Disputed Period were reasonable, but rather because it first concluded that the "non-defaulting Party," under the Master Agreement's attorneys' fees provision, was the arbitration's "prevailing party," that is, the party who obtained the largest monetary recovery in the arbitration, and then found TXU Retail was the "prevailing party" as it obtained the largest (and the only) monetary recovery in the arbitration by virtue of the settlement of its counterclaims.

MME's Third Circuit Brief failed to challenge TXU Retail's assertion that both the District Court and the Third Circuit were required to review the Panel's interpretation of the scope of the parties' submission deferentially. Instead, after agreeing that a deferential standard of review applied, MME simply argued that the District Court properly deferred to the Panel's interpretation of the scope of the submission because it allegedly carefully reviewed the arbitration record.

The Third Circuit agreed with TXU Retail. After holding that an arbitrator's interpretation of the scope of a submission was entitled to deference, the Third Circuit concluded that the arbitration "record as a whole provided an adequate basis upon which the [Panel] could conclude that it was empowered to address the reasonableness of TXU [Retail's] spot-gas prices in the event that a course-of-performance contract rather than the Master Agreement governed the parties' spot-gas transactions." Pet.'s App. at 15a. It also held that the District Court incorrectly vacated the attorneys' fees award for the reason set forth by TXU Retail in its Opening Brief. *Id.* at 19a-20a. Accordingly, the Third Circuit reversed the District Court's decision and remanded the case with instructions to enter judgment in favor of TXU Retail. *Id.* at 20a.

D. The Petition.

Unwilling to accept its loss in the Third Circuit, MME once again fired its attorneys and hired new ones to petition this Court for a writ of certiorari. Wholly ignoring the fact that MME's Third Circuit Brief never argued that a federal court is required to review an arbitrator's interpretation of the scope of a submission *de novo*, rather than deferentially, the Petition contends for the first time in this proceeding

that: (1) the decision below should be reversed because the Third Circuit applied the wrong standard of review; and (2) when the Panel's interpretation of the scope of the parties' submission is reviewed *de novo*, it becomes clear that the question of the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period was not submitted to the Panel for determination.

REASONS FOR DENYING THE PETITION

The Petition should be denied for three reasons. First, as pointed out above, MME never suggested, much less argued, in its Third Circuit Brief that the Panel's interpretation of the scope of the submitted issues should be reviewed *de novo*. Rather, it acknowledged in its Third Circuit Brief that such interpretation was to be reviewed deferentially, and even argued that the District Court properly deferred to the Panel's interpretation of the scope of the parties' submission. Accordingly, MME waived its argument that the Third Circuit applied the wrong standard of review below.

Second, and more important, MME's argument creates a false conflict among the Circuits and with this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), by confusing the standard of a federal court's review of an arbitrator's interpretation of the scope of a submission with the standard of a federal court's review of the question of arbitrability – whether the parties agreed to arbitrate in the first instance. When the issues are untangled and considered separately, it becomes crystal clear that: (1) there is no conflict among the Circuits regarding the proper standard of review of an arbitrator's interpretation of the scope of a submission because *every* Court of Appeals

that has directly considered the question has held, like the Third Circuit did below, that a federal court's review of an arbitrator's interpretation of the scope of a submission is highly deferential; and (2) the Third Circuit's decision below does not conflict with this Court's decision in *First Options* because *First Options* applies solely to the standard of review of an arbitrator's determination of arbitrability, and not to an arbitrator's interpretation of the scope of a submission.

Third, even if MME had not waived its issue by failing to raise it in the Third Circuit and even if a federal court is required to review an arbitrator's interpretation of the scope of a submission *de novo*, the Petition still should be denied because the arbitration record conclusively establishes that MME and TXU Retail submitted the question of the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period to the Panel for determination.

A. MME waived its issue by failing to raise it in the Third Circuit.

This Court does *not* grant certiorari to decide an issue that was not raised in the Court of Appeals, irrespective of its significance or novelty. As noted by this Court in *Adickes v. Kress & Co.*, 398 U.S. 144, 148 n.1 (1970): "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Accord*, *Howell v. Mississippi*, 125 S. Ct. 856, 860 (2005); *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Tennessee v. Dunlop*, 426 U.S. 312, 316 n.3 (1976).

Here, MME never raised the issue it asks this Court to resolve in the Third Circuit (or the District Court). It never argued in the Third Circuit (or the District Court) that a

de novo, rather than a deferential, standard of review applied to a federal court's review of an arbitrator's interpretation of the scope of a submission. Rather, in its Third Circuit Brief, MME agreed with TXU Retail that a deferential standard of review applied.

For example, TXU Retail's Opening Brief in the Third Circuit presented two broad issues: one with respect to the propriety of the Panel's finding that TXU Retail's spot-market gas charges during the Disputed Period were reasonable (the Scope Issue) and an another with respect to the propriety of the attorneys' fees award. The Scope Issue was framed in terms of whether the parties submitted the question of the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period to the Panel for determination. In this regard, TXU Retail's Opening Brief in the Third Circuit set forth the applicable standard of review of the Panel's interpretation of the scope of the parties' submission as follows:

> [A]n arbitrator's view of the scope of the submitted issues is entitled to the same far-reaching respect and deference that is normally accorded to his findings of fact and interpretations of the law. As noted by this Court: "[T]here is no doubt that our review of the interpretation of a submission is highly deferential[,]" *Matteson*, 99 F.3d at 113, and "'there must be *absolutely no support at all* in the record justifying the arbitrator's determinations for a court to deny enforcement of the award[,]'" *id.* at 113 (*quoting News Am. Pub., Inc. v. Newark Typographical Union, Local 103*, 918 F.2d 21, 24 (3d Cir. 1990) (emphasis added)). . . .

See TXU's Opening Br. at 27 (emphasis in original).

After setting forth this deferential standard of review, the introduction to the Brief's argument on the Scope Issue pointed out that the district court's holding on the issue "is wrong, however, because it is contrary to the arbitration record and fails to give the appropriate deference to the Panel's view of the issues submitted to it." *Id.* at 19. Moreover, the fourth subpoint in that argument made it clear that TXU Retail believed that a deferential standard of review applied and that the District Court erred in failing to apply one. For example the subpoint's heading read: "The district court failed to give the Panel's determination of the issues submitted to it the far-reaching respect and deference to which it is entitled." *Id.* at 43.

MME, in its Third Circuit Brief, agreed that a federal court reviews an arbitrator's interpretation of the scope of a submission deferentially. In fact, not only was the Third Circuit's decision in *Matteson v. Ryder Systems, Inc., supra*, the *most* cited case in MME's Third Circuit Brief, but the Brief also cited this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, whose holding, MME now contends conflicts with the Third Circuit's application of a deferential standard of review below, Pet. at 18-21, *only* for the proposition that, in reviewing a district court's decision upholding or vacating an arbitration award, an appellate court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*.

In sum, MME not only failed to raise the question of the proper standard of review in the Third Circuit, but in its Third Circuit Brief, it agreed with TXU Retail that a deferential standard of review applied to the issue in this case – how a federal court reviews an arbitrator's interpretation of the

scope of a submission.[11] Accordingly, this Court should deny the Petition.

B. The Third Circuit's decision below is consistent with the decisions of its sister Circuits and with this Court's decision in *First Options*.

Neither MME nor TXU Retail ever claimed during the arbitration that their dispute, or any portion of it, was not arbitrable. Just as important, they failed to provide the Panel with the precise issues it was to decide either in a single, comprehensive document or otherwise. Based on MME and TXU Retail's pleadings, briefs, and conduct during the arbitration, the Panel concluded that one of the submitted issues was whether TXU Retail's spot-market gas charges during the Disputed Period were reasonable.

Unhappy with the Panel's resolution of that issue, MME commenced this action to vacate the arbitration award. In doing so, it never claimed that the Panel lacked jurisdiction over the parties' dispute, or any part of it, because there was no arbitration agreement. Rather, after acknowledging that the Master Agreement required the parties to arbitrate their dispute, MME argued that the Panel had exceeded its authority by deciding an issue that allegedly had not been submitted to it – the reasonableness of TXU Retail's spot-

---

11. It is well settled that a party's failure to raise an issue in its brief waives the issue in the court of appeals. *E.g.*, *Robertson v. American Airlines, Inc.*, 401 F.3d 499, 504 n.2 (D.C. Cir. 2005); *Balojun v. Ashcroft*, 358 F.3d 464, 465 (7th Cir. 2004); *Herrmann Holding Ltd. v. Lucent Technologies, Inc.*, 302 F.3d 552, 562 n.2 (5th Cir. 2002); *$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 78 (2d Cir. 2001); *Melrose Med. Group Part. Savs. Plan v. Bulger*, 243 F.3d 773, 783 (3d Cir. 2001).

market gas charges during the Disputed Period. Thus, the issue before the Third Circuit was whether the Panel properly interpreted the scope of the parties' submission. In deciding that issue, the Third Circuit followed its long-standing precedent and held that the Panel's interpretation of the scope of the parties' submission was entitled to deference. Pet.'s App. at 10a, 14a-15a.

MME argues that a writ of certiorari should be granted because: (1) there is a conflict among the Circuits regarding the proper standard of review of an arbitrator's interpretation of the scope of a submission, with some Circuits reviewing the arbitrator's interpretation deferentially, as the Third Circuit did below, and others reviewing it *de novo*, Pet. at 12-18; and (2) the Third Circuit's deferential standard of review conflicts with this Court's decision in *First Options*, which it claims requires a federal court to review an arbitrator's interpretation of the scope of a submission *de novo*, Pet. at 18-22. MME, however, has created a *false* conflict by confusing two separate and distinct issues: the standard of review of an arbitrator's determination of arbitrability – whether the parties have agreed to arbitrate in the first instance – and the standard of review of an arbitrator's interpretation of the scope of a submission. When these issues are viewed separately, as they must be, it becomes clear that the Third Circuit applied the correct standard of review.

1. The Circuits agree that an arbitrator's interpretation of the scope of a submission is entitled to deference.

At the outset, the Courts of Appeals have recognized that different standards of review apply to an arbitrator's interpretation of the scope of a submission and to an arbitrator's determination of arbitrability. For example, the D.C. Circuit, in a case decided after *First Options*, explained that

> [t]his question—the scope of the submission to the arbitrator—should not be confused with the question of arbitrability—whether the employer and union agreed in the collective bargaining agreement to put a particular issue to arbitration. The latter question is reviewed by a federal court *de novo*. The former, as we have just indicated, is not.

Madison Hotel v. Hotel & Rest. Employees, Local 25, 144 F.3d 855, 857 n.1 (1998). The First Circuit made the same distinction in *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321 (2000), which also was decided after *First Options*. After holding that, when the issue is whether an arbitrator exceeded his authority by deciding an issue not submitted to him, "'the arbitrator's interpretation of the scope of the issue submitted to him is to be treated with great deference,'" *id.* at 332 (quoting *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1498 (9th Cir. 1990)), the court explained that

> [t]his case is distinguished from one in which a court asked to compel arbitration determines, in

> the first instance, whether the parties agreed to arbitrate their dispute at all. In that type of case, 'the court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act. . . .'

Id. at 332 n.8 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). Finally, the Fifth Circuit in *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314 (1994), which was decided before *First Options*, also distinguished the standard of review a federal court applies to an arbitrator's interpretation of the scope of a submission from his or her determination of arbitrability. After holding that the arbitrability determination is reviewed *de novo*, *id.* at 1321, the court took

> note of the view expressed by our sister circuits that the arbitrator's interpretation of the scope of the issues submitted to him is entitled to the same judicial deference accorded his interpretation of the agreement being arbitrated, but [found] it unnecessary to adopt or reject that view given the clear facts of this case.

Id. at 1321 n.1 (citations omitted).[12]

---

12. Notwithstanding the fact that in *Executone Information Systems, Inc.*, the Fifth Circuit expressly declined to decide the proper standard of review of an arbitrator's interpretation of the scope of a submission, the Petition incorrectly cites it for the proposition that the Fifth Circuit reviews such an interpretation *de novo*. Pet. at 13. It also incorrectly cites *Iron Workers Local No. 272 v. Bowen*, 624

(Cont'd)

More important, there is *no* conflict among the Circuits regarding the standard of review of an arbitrator's interpretation of the scope of a submission. *Every* Circuit that has considered the question, both before and after *First Options*, has held that a federal court reviews such an interpretation deferentially. *E.g.*, *Bull HN Info. Sys., Inc.*, 229 F.3d at 332; *Coastal Oil of N. Eng., Inc. v. Teamsters Local 25*, 134 F.3d 466, 469 (1st Cir. 1998); *Boston & Maine Corp. v. Brotherhood of Maintenance of Way Employees*, 94 F.3d 15, 19 (1st Cir. 1996); *El Dorado Technical Servs., Inc. v. Union Gen. de Trabajordores*, 961 F.2d 317, 321 (1st Cir. 1992); *Kurt Orban Co. v. Angeles Metal Sys.*,

(Cont'd)

F.2d 1255 (5th Cir. 1980), for the same proposition, *id.* at 14, even though there, the Fifth Circuit, as it later did in *Executone Information Systems, Inc.*, declined to decide the issue:

> We note that *General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*, 560 F.2d 700, 707-08 n.8 (5th Cir.), *rev'd en banc on other grounds*, 579 F.2d 1282 (1978), *cert. denied*, 443 U.S. 913, 99 S. Ct. 3103, 61 L. Ed. 877 (1979) (citing *United Steel Workers of America v. United States Gypsum Co.*, 492 F.2d 713, 732 (5th Cir.), *cert. denied*, 419 U.S. 998, 95 S. Ct. 312, 42 L. Ed. 2d 271 (1974)), suggests that "disputes over the scope of a submission are themselves to be resolved by the arbitrator." But since in this case the court's construction of the issue submitted was precisely the same as the arbitrator's, we need *not* resolve whether the court's or the arbitrator's version would prevail if they differed.

Id. at 1264 n.18 (emphasis added).

Finally, the Petition fails to cite *Bull HN Information Systems, Inc.* and, although it cites *Madison Hotel*, it ignores the distinction the D.C. Circuit made between the standard of review of an arbitrator's determination of arbitrability and the standard of review of an arbitrator's interpretation of the scope of a submission. *See* Pet. at 16.

573 F.2d 739, 740 (2d Cir. 1978); *Metromedia Energy, Inc. v. Ensearch Energy Servs., Inc.*, 409 F.3d 574, 578, 579 (3d Cir. 2005); *Major League Umpires Ass'n v. American League of Prof'l Baseball Clubs*, 357 F.3d 272, 279 (3d Cir. 2004); *Matteson*, 99 F.3d at 113; *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299, 302 (3d Cir. 1982); *Richmond, Fredericksburg & Potomac R.R. v. Transportation Communications Int'l Union*, 973 F.2d 276, 280 (4th Cir. 1992); *Volvo GM Heavy Truck Corp. v. International Union*, No. 89-1515, 1990 WL 136644, at *2 (4th Cir. Sept. 24, 1990); *International Ass'n of Machinists & Aerospace Workers v. Tennessee Valley Auth.*, 155 F.3d 767, 772 (6th Cir. 1998); *Lattimer-Stevens Co. v. United Steelworkers of Am.*, 913 F.2d 1166, 1170 (6th Cir. 1990); *American Postal Workers Union v. Runyon*, 185 F.3d 832, 835-36 (7th Cir. 1999); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 560 (8th Cir. 1990); *Association of W. Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc.*, 221 F.3d 1085, 1087 (9th Cir. 2000); *Peabody W. Coal Co. v. District 22, United Mine Workers of Am.*, No. 03-15569, 99 Fed. Appx. 116, 117 (9th Cir. May 18, 2004); *Sheet Metal Workers' Int'l Ass'n Local Union 359 v. Madison Indus., Inc.*, 84 F.3d 1186, 1190 (9th Cir. 1996); *Pack Concrete, Inc. v. Cunningham*, 866 F.2d 283, 285-86 (9th Cir. 1989); *Madison Hotel*, 144 F.3d at 857.[13]

---

13. No Fifth, Tenth, Eleventh, or Federal Circuit decisions have been found that decide the issue, although one district court in the Tenth Circuit has held that an arbitrator's interpretation of the scope of a submission is reviewed deferentially, *Advanced Technical Assocs., Inc. v. Segilman*, 39 F. Supp. 2d 1311, 1316 (D. Kan. 1999) (citing *El Dorado Technical Servs., Inc.*, 961 F.2d at 321). Moreover, with the exception of *Executone Information Systems, Inc.*, 26 F.3d at 1321 n.1, and *Iron Workers Local No. 272*, 624 F.2d at 1264 n.18, in which the Fifth Circuit declined to decide it, the cases cited by MME for the proposition that the Second, Fifth, Tenth, and Eleventh Circuits review an arbitrator's

(Cont'd)

There are several reasons why the Circuits uniformly have held that an arbitrator's interpretation of the scope of a submission is entitled to deference. First, "deference to an

---

(Cont'd)

interpretation of a submission's scope *de novo* did not involve that issue. *See* Pet. at 13-14. Rather, they either set forth the standard of review of arbitrability, *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661-62 (2d Cir. 2005); *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169, 171 (2d Cir. 2004); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 26-27 (2d Cir. 2002); *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 53, 57-58 (2d Cir. 2001); *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996), *Local Union No. 898 v. XL Elec. Inc.*, 380 F.3d 868, 870 (5th Cir. 2004); *GMC v. Pamela Equities Corp.*, 146 F.3d 242, 247-50 (5th Cir. 1998); *Smith v. Currency Trading Int'l, Inc.*, No. 98-1311, 1999 U.S. App. LEXIS 18182, at *5 (10th Cir. Aug. 3, 1999); *Bakery, Confectionery & Tobacco Workers Local No. 262 v. Brown & Williamson*, 971 F.2d 652, 655 (11th Cir. 1992), or for a district court's decision upholding or vacating an arbitration award, *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 526-27 (2d Cir. 2005); *E.I. Dupont de Nemours & Co. v. Local 900*, 968 F.2d 456, 458 (5th Cir. 1992).

In the same vein, MME's claim that decisions within the First, Fourth, Eighth, Ninth, and D.C. Circuits stand in "confusing disarray," Pet. at 16-17, is based on an "apples-to-oranges" comparison of cases setting forth the standard of review of an arbitrator's interpretation of the scope of a submission, *e.g.*, *Madison Hotel*, 144 F.3d at 857; *Boston & Maine Corp.*, 94 F.3d at 19; *Richmond, Fredericksburg & Potomac R.R.*, 973 F.2d at 280; *John Morrell & Co.*, 913 F.2d at 560; *Pack Concrete, Inc.*, 866 F.2d at 285-86, with cases setting forth the standard of review of arbitrability, *e.g.*, *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 747 (8th Cir. 2003); *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 9 (1st Cir. 2000); *KenAmerican Res., Inc. v. International Union*, 99 F.3d 1161, 1163 (D.C. Cir. 1996) (same); *Carpenters 46 N. Cal. Counties Conf. Bd. v. Zion Builders*, 96 F.3d 410, 414 (9th Cir. 1996); *E.I. Dupont de Nemours & Co. v. Martinsville Nylon Employees' Council Corp.*, No. 94-2222, 1996 U.S. App. LEXIS 3208, at *7-8 (4th Cir. Feb. 28, 1996).

arbitrator's interpretation of a submission follows from [this Court's] directive that 'when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator.'" *Pack Concrete, Inc.*, 866 F.2d at 285 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987)). Second, "[f]ailure to adopt this [deferential] standard would require the judiciary 'to determine, case by case, the exact scope of submission in the endless number'" of arbitrations, *id.* (quoting *Mobil Oil Corp.*, 679 F.2d at 302), and such plenary review would undermine the federal policy underlying arbitration as "an expeditious and relatively inexpensive means of resolving disputes," *id.*; *accord*, *Mobil Oil Corp.*, 679 F.2d at 302. Finally, "interpreting the issue submitted often requires construction of the agreement itself, a job clearly for the arbitrator." *Pack Concrete, Inc.*, 866 F.2d at 285-86; *accord*, *Mobil Oil Corp.*, 679 F.2d at 302.[14]

2. The Third Circuit's decision does not conflict with this Court's decision in *First Options*.

The Third Circuit's decision below does not conflict with this Court's decision in *First Options*. *First Options* only involved the question of the proper standard of review of an arbitrator's determination of arbitrability, and not the question of the proper standard of review of an arbitrator's interpretation of the scope of a submission. 514 U.S. at 940, 942. Moreover, if anything, *First Options*' reasoning is consistent with the application of a deferential standard of review to an arbitrator's interpretation of the scope of a submission.

---

14. Of course, the parties in an arbitration can prevent an arbitrator from misinterpreting the scope of their submission by precisely and clearly setting forth the issues to be decided by the arbitrator in a single, comprehensive document or otherwise, something which, of course, MME and TXU Retail failed to do.

In *First Options*, this Court held that a federal court reviews the question of arbitrability *de novo*. *Id.* at 943-45. In doing so, the Court explained:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakeabl[e] evidence that they did so." *AT&T Technologies*[, *Inc. v. Communications Workers of Am.*], 475 U.S. [643, 649 (1986)]. . . . In this manner the law treats silence or ambiguity about the question of *who* (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about the question *whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement—for in respect to this latter question the law reverses the presumption. See *Mitsubishi Motors*, [473 U.S. at 626]("'Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'") (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Steelworkers v. Warrior* [&] *Gulf Nav. Co.*, 363 U.S. [574, 582-83 (1960)].
>
> But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issue. In such circumstances, the parties likely gave thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, see, *e.g.*, *Mitsubishi Motors*, *supra*, at 626, one can

> understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate. . . .

Id. at 944-45 (emphasis in original). Of course, a decision regarding the scope of a submission is more akin to the decision of "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" than it is to the question of arbitrability. Accordingly, an arbitrator's interpretation of the scope of a submission is procedural, not substantive, and the arbitrator necessarily should interpret it in the first instance, with such interpretation being reviewed deferentially by a federal court. *E.g.*, *Pack Concrete, Inc.*, 866 F.2d at 285.

C. The arbitration record conclusively establishes that MME and TXU Retail submitted the question of the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period to the Panel for determination.

Even if MME's had not waived its issue by failing to raise it in its Third Circuit Brief and even if a federal court reviews an arbitrator's interpretation of the scope of a submission *de novo*, the Petition should still be denied because the arbitration record conclusively establishes that MME and TXU Retail submitted the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period to the Panel for determination. For example:

- TXU Retail in its responses to MME's "Statement of Claims" and in its pre- and post-arbitration briefs consistently maintained that the spot-market gas was sold under a separate course-of-performance contract

and that its spot-market charges during the Disputed Period under that contract were proper. More important, MME never objected to TXU Retail's position or advised the Panel, in response to it, that the only issue in the arbitration was whether the Master Agreement and/or Confirmed Transactions set the spot-market gas price.

- MME agreed, immediately before the arbitration hearing, that there was to be "one final arbitration award" embodying both the settlement of TXU Retail's counterclaims and its recovery on its overcharge claim. Of course, one such award could be issued only if the Panel was empowered to decide if MME was overcharged for spot-market gas during the Disputed Period, irrespective of whether the Master Agreement, the Confirmed Transactions, or the course-of-performance contract set its price.

- TXU Retail introduced expert testimony at the arbitration hearing about the propriety of its spot-market gas charges during the Disputed Period under the course-of-performance contract without objection from MME.

- MME's Pass-Through Claim, raised for the first time during the arbitration hearing, put in issue both the propriety of TXU Retail's spot-market gas charges during the Disputed Period under the course-of-performance contract and whether TXU Retail's spot-market gas charges under that contract during that period reflected the market price.

- The Neutral Arbitrator's Post-Hearing Letter advised the parties that the Panel intended to decide whether the spot-market gas price was the price under the Master Agreement and/or the Confirmed Transactions, as maintained by MME, or the market price under a course-of-performance contract, as maintained by TXU Retail. It also requested information that was relevant only to a determination of the propriety of TXU Retail's spot-market gas charges during the Disputed Period under a course-of-performance contract. And, MME provided the requested information without objection.

- MME despite its knowledge that TXU Retail, at least in its Post-Arbitration Brief, was asking the Panel to determine the propriety of its spot-market gas charges during the Disputed Period under the course-of-performance contract never objected to the request.

- MME participated in post-arbitration award proceedings to determine the amount of TXU Retail's attorneys' fees without objecting to the proceedings as exceeding the Panel's authority because the award was based, as it claimed in the District Court and in the Third Circuit, on the Panel's improper determination that TXU Retail's spot-gas charges during the Disputed Period were reasonable under the course-of-performance contract.

- MME has accepted the benefits of the Panel's determination of the reasonableness of TXU Retail's spot-market gas charges during the Disputed Period. The Panel, after determining that the charges were reasonable under the course-of-performance contract, found more than $174,000 in accounting errors by TXU Retail with respect to them. It, therefore, offset that amount against the stipulated damages MME agreed

> TXU Retail was entitled to recover under its counterclaim. MME, throughout this proceeding, has sought to preserve the offset.

Here, it is clear that MME and TXU Retail unmistakably submitted the question of the reasonableness of TXU Retail's spot-market charges during the Disputed Period to the Panel for determination. This Court should not allow MME to now claim that the Panel exceeded its powers in deciding the submitted issue merely because its determination was unfavorable to MME.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

THOMAS F. LILLARD
Counsel of Record
ROBERT K. WISE
MILES B. HABERER
HUNTON & WILLIAMS LLP
Energy Plaza
1601 Bryan Street, 30th Floor
Dallas, TX 75201
(214) 979-3000

LEDA DUNN WETTRE
ROBINSON & LIVELLI
Two Penn Plaza East
Newark, NJ 07105
(973) 690-5400

Attorneys for Respondents

3

FILED
DEC 14 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-295

IN THE

Supreme Court of the United States

METROMEDIA ENERGY, INC.,

Petitioner,

v.

ENSERCH ENERGY SERVICES, INC.; TXU ENERGY COMPANY LLC; TXU ENERGY TRADING; TXU ENERGY SERVICES, N/K/A TXU ENERGY RETAIL COMPANY, LP; TXU JOHN DOES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

G. ERIC BRUNSTAD, JR.
Counsel of Record
RHEBA RUTKOWSKI
SUSAN KIM
BRIAN R. HOLE
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2717

Counsel for Petitioner

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Authorities	iii
I. The Circuits Are Divided Over the Question Presented.	5
II. The Third Circuit's Decision Conflicts With This Court's Precedents.	7
III. MME Did Not Waive The Question Presented.	9
IV. TXU's Factual Contention Regarding The Submission Of The Issues Is Erroneous And Irrelevant.	10
Conclusion	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

187 Concourse Associates v. Fishman, 399 F.3d 524 (2d Cir. 2005) 5

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643 (1986) 7

American Postal Workers v. Runyon, 185 F.3d 832 (7th Cir. 1999) 5

Carpenters 46 N. Cal. Counties Conf. Board v. ZCON Builders, 96 F.3d 410 (9th Cir. 1996) 1

Coady v. Ashcraft & Gerel, 223 F.3d 1 (1st Cir. 2000) 1

Dorado Beach Hotel Corp. v. Union De Trabajadores De La Industria Gastronomica de Puerto Rico, 959 F.2d 2 (1st Cir. 1992) 5

Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314 (5th Cir. 1994) 2

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) ..... *passim*

Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002) 2, 8

John Morrell & Co. v. Local Union, 913 F.2d 544 (8th Cir. 1990) 5

Madison Hotel v. Hotel & Rest. Emp., Local 25, 144 F.3d 855 (D.C. Cir. 1998) 1

Authorities

Page

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 8

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 7

FEDERAL STATUTES

9 U.S.C. § 10(a) ..... *passim*

9 U.S.C. § 11(b) ..... *passim*

REPLY BRIEF FOR PETITIONER

TXU's Brief in Opposition demonstrates why the Court should grant certiorari in this case. Like several of the courts of appeals, TXU confuses the issue of the *authority* of an arbitrator to decide a particular issue (i.e., the question of "arbitrability," which is reviewed *de novo*) with the *merits* of the arbitrator's decision (i.e., the question whether the arbitrator correctly decided an issue that he or she had the authority to decide, which is reviewed under a deferential standard). Petitioner MME contends, and many courts of appeals have held, that the question of arbitrability (the authority of an arbitrator to decide an issue) turns on two things: (1) whether the issue falls within the scope of the arbitration clause of the parties' pre-negotiated contract; and (2) whether the issue falls within the scope of the parties' submission of the issues for arbitration. In contrast, TXU argues, and several courts of appeals have held, that the scope of the parties' submission is *not* a question of arbitrability and is subject to review under the same deferential standard that governs review of the merits of the arbitrator's award. Opp. at 19-20. Clearly, the scope of the parties' submission either *is* a question of arbitrability subject to independent *de novo* review (as many courts of appeals have held), or is *not* a question of arbitrability and is subject to some other standard of review (as other courts of appeals have held). Certiorari is warranted precisely because the courts of appeals are divided over the question and TXU's contrary analysis of the cases is mistaken. *Compare, e.g., Madison Hotel v. Hotel & Rest. Employees, Local 25*, 144 F.3d 855, 857 n.1 (D.C. Cir. 1998) (distinguishing the scope of the parties' submission from the question of arbitrability and recognizing the different standards of review) *with, e.g, Coady v. Ashcraft & Gerel*, 223 F.3d 1, 8-9 & n.10 (1st Cir. 2000) (reviewing independently under the *de novo* standard as a question of arbitrability both the scope of the pre-negotiated contract and the submission of issues); *Carpenters 46 N. Cal. Counties Conf. Bd. v. ZCON Builders*, 96 F.3d 410, 415-16 (9th Cir. 1996) (concluding that "the district court erred in deferring to the arbitrator's decision" regarding arbitrability, including whether a party

by its conduct had agreed to submit a particular question to the arbitrator); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1321, 1323 (5th Cir. 1994) (addressing whether an "issue was arbitrable"; stating that "[i]f the parties go beyond their promise to arbitrate and actually submit an issue to the arbitrator, we look both to the contract and to the scope of the submissions to the arbitrator to determine the arbitrator's authority," and concluding "that the question of whether a party can be compelled to arbitrate, as well as the question of what issues a party can be compelled to arbitrate, is an issue for the court rather than the arbitrator to decide").

Certiorari also is warranted because the decision of the Third Circuit conflicts with prior decisions of this Court. Arguing to the contrary, TXU contends once again that the scope of the parties' submission is not a question of arbitrability and, therefore, that the Court's precedents applying a *de novo* standard of review to questions of arbitrability do not apply. As this Court has explained, however, "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the *question of arbitrability*, is an issue for judicial determination." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal quotation marks and citations omitted). Because the scope of the parties' submission *is* a question of arbitrability, no less than the scope of their pre-negotiated contract, it is properly subject to *de novo* review.

Further, although TXU contends that MME waived its presentation of the question presented, this assertion is indefensible. The relevant portions of MME's brief to the Third Circuit refuting TXU's contention are recited below. More important, the Third Circuit plainly understood that MME was challenging the arbitrator's authority, stating: "MME's challenge to the arbitration award focuses not upon the underlying merits of the panel's analysis, but rather upon whether the panel exceeded its authority by resolving in its opinion an issue the parties had not agreed to arbitrate." Pet. App. at 8a. At MME's urging, the district court reviewed the record independently and *expressly found* that "the record in this matter does not support TXU's contention that MME and

TXU submitted to the arbitrators issues regarding the terms of the spot gas contract and whether TXU's pricing pursuant to the spot gas contract was reasonable." Pet. App. at 26a. In its brief to the Third Circuit, MME plainly urged the court to affirm the district court's approach and conclusions, and stated that the Third Circuit should review the district court's determination under the ordinary standard of appellate review required by this Court's decision in *First Options* (i.e., findings of fact are set aside only if they are clearly erroneous, and conclusions of law are reviewed *de novo*). But instead of doing so, the Third Circuit stated: "[W]e owe no deference to the District Court's analysis, and instead we exercise plenary review over the District Court's decision to vacate the arbitration award." Pet. App. at 9a. The Third Circuit then rejected the district court's independent *de novo* approach and instead followed its prior precedents in *Matteson* and *Roadway* requiring broad deference to the arbitrator's decision. Pet. App. at 8a-11a. Contrary to TXU's argument, the Third Circuit's rejection of both the district court's *de novo* approach and MME's arguments in favor of that approach does not demonstrate waiver. Rather, it demonstrates precisely the opposite – that the Third Circuit squarely resolved the question presented by rejecting MME's arguments.

Moreover, TXU does not deny that the question presented is an important issue that implicates the legitimacy of arbitration proceedings. Nor does TXU deny that the resolution of the question presented in this case is outcome determinative. Applying an independent *de novo* standard of review on the question of arbitrability, the district court overturned the arbitrators' award as straying beyond the scope of their authority. Applying a highly deferential standard of review, the Third Circuit ordered affirmance of the arbitrators' award as within their authority, based on deference to the arbitrators' implicit determination that the controversy was arbitrable. The Third Circuit did *not* contend that the district court erred in its application of its independent *de novo* standard. Nor did the Third Circuit contend that the district court's factual findings were clearly erroneous. Rather, the Third Circuit simply rejected in its entirety the district court's

de novo approach in favor of a highly deferential standard. The issue is thus properly presented in this case, and it is one that the Court should review.

TXU contends that the question that the arbitrators ultimately decided (e.g., the reasonableness of TXU's charges under the separate "course-of-performance" contract) was, in fact, "submitted" to the arbitrators because TXU presented arguments during the course of the arbitration proceeding regarding the reasonableness of its prices under this separate "contract." But TXU does not challenge as clearly erroneous the district court's contrary factual finding that MME never agreed that the arbitrators could decide this issue. *See* Pet. App. at 27a ("After reviewing the record, the Court is satisfied that at no time did MME consent to have the panel determine what terms and conditions were applicable to the spot gas contract if the Master Agreement did not apply to the spot gas sales."). Moreover, as this Court's analysis in *First Options* suggests, the mere fact that one party makes arguments about an issue during an arbitration proceeding does not demonstrate that *both* parties thereby agreed for the issue to be submitted to the arbitrators as is required for the arbitrators to have the necessary authority to decide it. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) ("[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue"). Indeed, TXU concedes that, following the parties' partial settlement of their claims and counterclaims just prior to the arbitration hearing (which settlement encompassed *all* of TXU's counterclaims), the only claim that remained for the arbitrators to decide was MME's claim that TXU overcharged MME in violation of the *Master Agreement*. Opp. at 6-7. Although TXU could (and did) present arguments suggesting that the Master Agreement was not violated because the terms of the Master Agreement did not apply to the particular spot transactions in question, TXU did not thereby bind MME to arbitrate the reasonableness of TXU's prices under any separate course-of-performance contract because, under the terms of the arbitration clause of the Master Agreement, MME agreed contractually to arbitrate only disputes under the *Master Agreement*, not other contracts, and

MME never consented to the submission of any other issue. MME was entitled to rely on the limited scope of the arbitration proceeding, as defined by the Master Agreement and MME's single remaining properly submitted claim, and TXU was not entitled to expand unilaterally the arbitrator's jurisdiction. In any event, TXU's argument supplies no basis to deny certiorari review because, owing to its decision to defer to the arbitrators' implicit determination of arbitrability, the Third Circuit never actually considered whether any of the district court's factual determinations were clearly erroneous, including the district court's independent factual finding that MME never consented to submit to the arbitrators the question whether the spot gas transactions were reasonable. To the extent that TXU wishes to challenge the district court's findings, it may do so on remand in accordance with ordinary appellate procedures under a correct standard of review.

I. The Circuits Are Divided Over the Question Presented.

As explained in MME's Petition, many courts of appeals have held that an arbitrator's authority over a particular issue (i.e., the arbitrability of the issue) turns on consideration of two things: (1) the terms of the parties' pre-negotiated contractual arbitration clause; and (2) the terms of their submission of the issues for arbitration. *See, e.g., 187 Concourse Associates v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005) ("[T]he scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission") (internal quotation marks and citation omitted); *American Postal Workers v. Runyon*, 185 F.3d 832, 835 (7th Cir. 1999) ("The parties may limit the arbitrator's contractual authority to address a dispute through: (1) the contract; and (2) the issue submitted to the arbitrator."); *Dorado Beach Hotel Corp. v. Union De Trabajadores De La Industria Gastronomica de Puerto Rico*, 959 F.2d 2, 4 (1st Cir. 1992) ("[A]n arbitrator's authority [under the parties' contract] may be supplemented by the parties' submissions."); *John Morrell & Co. v. Local Union*, 913 F.2d 544, 561 (8th Cir. 1990) ("[W]e must look both to their contract and to the submission of the issue to the arbitrator to determine his authority.") (emphasis, internal quotation marks, and citation omitted). Thus, even

though a pre-negotiated contract may provide for the arbitration of certain issues, the parties may limit or expand the scope of the proceeding by agreeing to submit a particular set of issues for arbitration. In this way, the parties establish by agreement (either through their pre-negotiated contract or their submissions) the arbitral jurisdiction of the arbitrators. Under the express provisions of sections 10(a) and 11(b) of the FAA, a federal district court is authorized to ensure that an arbitrator stays within the bounds of his or her arbitral jurisdiction by vacating or modifying an arbitration award "[w]here the arbitrators exceeded their powers" or "[w]here the arbitrators have awarded upon a matter not submitted to them." 9 U.S.C. §§ 10(a) & 11(b).

Contrary to the decisions of the courts of appeals cited above, TXU asserts that the question of the scope of the parties' submission is *not* a question of arbitrability. Building on this premise, TXU separates "the standard of review of an arbitrator's determination of arbitrability – whether the parties have agreed to arbitrate in the first instance – and the standard of review of an arbitrator's interpretation of the scope of the submission." Opp. at 18. TXU *concedes* that the proper standard of review applicable to the question of arbitrability is *de novo*. Opp. at 25. Nevertheless, TXU asserts that the question of the authority of an arbitrator to decide an issue based on the scope of the parties' submission should be reviewed in the same manner as the merits of the arbitrator's decision – under a highly deferential standard – citing circuit decisions in support of its position. Opp. at 19. But inasmuch as the scope of the parties' submission defines the arbitrator's authority no less than the scope of the parties' pre-negotiated contract (as many courts of appeals have held), the scope of the parties' submission plainly *is* a question of arbitrability and TXU's distinction is a false dichotomy. More important, far from demonstrating the absence of a circuit conflict, TXU's argument and supporting citations prove the existence of a sharp conflict among the circuits, as the decisions cited by TXU conflict squarely with all of the circuit decisions that hold that the question of the scope of the parties' submission defines

the authority of the arbitrators no less than the parties' pre-negotiated contract.

It is telling that neither TXU nor any of the cases upon which it relies offers any explanation why review of the scope of the parties' submission should be treated any differently from review of the arbitrator's interpretation of the scope of the arbitration clause in the parties' pre-negotiated contract. Because both define the scope of the arbitrator's authority and are for the court to decide under sections 10(a) and 11(b) of the FAA, both are questions of arbitrability subject to *de novo* review. And because numerous courts of appeals have made the same mistake that TXU makes in this case (by conflating the authority of the arbitrator to make a decision with the merits of a decision that the arbitrator has the authority to make), certiorari is warranted to address and resolve the profound confusion and conflict among the circuits on this important question of law.

II. The Third Circuit's Decision Conflicts With This Court's Precedents.

The decision below conflicts with the decisions of this Court establishing that the question of arbitrability is for the court to decide under a *de novo* standard. In response, TXU contends once again that the question whether the arbitrators exceeded their authority by straying beyond the scope of the issue submitted is not a question of arbitrability and, therefore, that the Court's decision in *First Options* does not apply. Opp. at 24. TXU's analysis is wrong because the question whether the arbitrators exceeded their authority by straying beyond the scope of the issue submitted *is* a question of arbitrability, no less than the question whether the arbitrators exceeded their authority by straying beyond the scope of the parties' pre-negotiated arbitration clause, as both define the arbitral jurisdiction of the arbitrators.

As the Court stated in *AT&T*, "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). The rule that follows